COURT NO. B200193
ESTATE NO.11-2636604
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF

SNFW FITNESS B.C. LTD.

NOTICE OF APPLICATION

Name of applicant: Bank of Montreal ("**BMO**")

And To: SNFW Fitness B.C. Ltd. ("**SNFW**")

And To: The Bowra Group Inc. ("**TBGI**"), in its capacity as proposal trustee and instrument appointed receiver of SNFW (the "**Receiver**")

And To: The Offices of the Superintendent of Bankruptcy

And To: All other parties on the Service List attached as **Schedule "A"**

TAKE NOTICE that an application will be made by the applicant before the Honourable Madam Justice Fitzpatrick at the Courthouse, at 800 Smithe Street, Vancouver, B.C. on July 23, 2020 at 10:00 a.m. or soon thereafter as counsel may be heard for the following Orders set out in Part 1 below.

Part 1: ORDER SOUGHT

1. An Order substantially in the form attached as **Schedule "B"** approving the Asset Purchase Agreement (the "**APA**") among FW Fitness BC Ltd. (the "**Purchaser**") and the Receiver, as vendor, and vesting title to assets described therein.

2. Such further and other relief as counsel may advise and this Court may allow.

Part 2: FACTUAL BASIS

Background

3. The Applicant, Bank of Montreal, is a chartered bank of Canada having an address for service in this proceeding care of its solicitors, Dentons Canada LLP, 20th Floor, 250 Howe Street, Vancouver, British Columbia ("**BMO**").

4. Bank of Montreal, d.b.a BMO Capital Partners, is a branch of BMO responsible for special financing and lending ("**BMO Capital Partners**", together with BMO, the "**Bank**").

5. SNFW was engaged in the business of operating 27 fitness facilities located throughout the province of British Columbia. SNFW offered fitness facilities for personal use, fitness group classes, and personal training.

6. The Bank provided various credit facilities to SNFW in October of 2014. As security for its obligations to the Bank, SNFW has provided certain security to the Bank, including general security agreements dated October 14, 2014 charging all present and after acquired personal property.

SNFW Financial Difficulties

7. On or around March 17, 2020, SNFW issued a notice to all members that due to the Province of BC limiting gatherings of 50 people to slow the COVID-19 spread, all facilities would be shut down and that membership payments would not be charged during the shutdown period.

8. On or about March 17, 2020, SNFW terminated all of its staff except 6 key personnel.

9. On or about March 22, 2020, SNFW advised the Bank that the Board of Directors of SNFW was not willing to work through the COVID-19 shut down. The Board advised that it believed that SNFW would suffer far too much loss during the shutdown than could reasonably be recoverable. SNFW indicated to the Bank that it was willing to cooperate with the Bank to help the Bank recover as much as possible, but SNFW was not in a position to resume operations following the COVID-19 shut down.

The Bank Demand

10. As of March 31, 2020, SNFW had a total of $24,806,582.82 of outstanding indebtedness owing to BMO (the "**BMO Indebtedness**").

11. As of March 31, 2020, SNFW had a total of $8,416,065.90 of outstanding indebtedness owing to BMO Capital Partners (the "**BMO Capital Partners Indebtedness**", together with the BMO Indebtedness, the "**Indebtedness**").

12. On or about April 2, 2020, the Bank wrote to SNFW demanding payment of the Indebtedness (the "**BMO Demand**" and the "**BMO Capital Partners Demand**" together, the "**Demands**").

13. The Bank provided SNFW the standard ten day notice period in the Demands.

14. On or about April 2, 2020, after receiving the Demands, SNFW granted waivers of the ten day notice period to both BMO and BMO Capital Partners (the "**Waivers**").

The SNFW NOI Proceedings

15. On or around April 3, 2020, SNFW filed a notice of intention to make a Proposal with the Office of the Superintendent of Bankruptcy with TBGI being named as Proposal Trustee (the "**NOI**").

16. BMO was supportive of SNFW's efforts and steps taken during the NOI proceedings.

17. On or about April 24, 2020, in the NOI proceedings, SNFW obtained an order of the Supreme Court of British Columbia allowing SNFW, along with TBGI and MNP Corporate Finance Inc. ("**MNP**"), to run a sales process and solicitation process to sell all the assets and undertakings of SNFW (the "**SISP**").

The Sales Process

18. Throughout the months of April and May 2020, TBGI and MNP took the following steps in carrying out the SISP:

    (a) compiled a target list of prospective purchasers and investor groups;

    (b) compiled information for a data room;

    (c) created a Teaser Letter and Confidential Information Memorandum ("**CIM**");

    (d) sent the Teaser Letter and CIM to prospective investors and purchasers;

    (e) marketed the assets by contacting prospective purchasers and investors; and

    (f) obtained non-disclosure agreements from prospective purchasers and investors and provided those purchasers or investors with access to the data room to complete due diligence.

19. TBGI and MNP set May, 29, 2020 as the deadline for investors or purchasers to submit tender bid offers (the "**Tender Bid Offer Deadline**"). A total of four bids were received.

20. On June 8, 2020, TBGI and MNP selected the bid submitted on behalf of FW Fitness BC Ltd. (the "**Purchaser**") as the best offer (the "**FWF Offer**").

21. Under the FWF Offer, the Purchaser:

    (a) offered to purchase substantially all of the assets of SNFW for a total purchase price of $9 million;

    (b) indicated it intended to retain the majority of club locations, subject to negotiating assignment agreements with landlords; and

    (c) agreed to retain or re-hire at least 65% of the employees (and former employees) of SNFW, the majority of whom were terminated in March just before the commencement of the NOI Proceedings.

The Receivership and the APA

22. After acceptance of the FWF Offer, the parties began negotiating the various agreements that the FWF Offer was contingent on, including shareholder agreements and financing to fund the purchase price and post-acquisition operating capital. There have been some delays in finalizing these negotiations.

23. As a result of these delays and to protect its position in the event of a bankruptcy of SNFW, on or about July 13, 2020, BMO sought to appoint a receiver under an Instrument of Appointment, naming TBGI as the receiver. TBGI accepted the appointment on July 21, 2020.

24. It is expected that TBGI (in its capacity as receiver), as vendor, will enter into an Asset Purchase Agreement (the "**APA**") with the Purchaser, which will substantially reflect the terms of the FWF Offer. Pursuant to the APA, the Purchaser will, *inter alia*:

    (a) acquire the "Purchased Assets", which includes:

        (i) substantially all of the personal property owned by SNFW;

        (ii) an assignment of the real property leases identified in the APA (the "**Leases**"), pursuant to assignment agreements to be entered into with the landlords of the respective leased premises (the "**Lease Assignment Agreements**"); and

        (iii) an assignment of all contractual rights, including vehicle leases, held by SNFW; and

(b) offer employment to a significant portion of the current and former employees of SNFW, to be identified in the APA.

25. The only entities that hold perfected security interests in the assets of SNFW are the Bank, GM Financial Canada Leasing Ltd. ("**GM Financial**"), and Toyota Credit Canada Inc. ("**Toyota**"). GM Financial and Toyota are vehicle lessors and the Purchaser intends to take an assignment of all vehicle leases held by SNFW.

26. As a result of foregoing, the only creditor with a perfected security interest in the assets of SNFW who is impacted by the approval and vesting order is the Bank.

27. The APA is conditional on, *inter alia*:

(a) the Purchaser entering into the Assignment Agreements; and

(b) this Court granting an approval and vesting order, substantially in the form sought by BMO in this application.

Part 3: LEGAL BASIS

28. BMO relies on the *Supreme Court Civil Rules*, the *Personal Property Security Act*, the *Bankruptcy and Insolvency Act*, and the inherent jurisdiction of this Honourable Court.

29. The Court has authority to approve a sale by a receiver, and grant a vesting order, under Rule 13-5 of the *Supreme Court Civil Rules*. In addition, the Court has supervisory jurisdiction over enforcement of security interests and receivers pursuant to sections 63 and 64 of the *Personal Property Security Act*.

BC, *Supreme Court Civil Rules*, r. 13-5.

***Personal Property Security Act*, R.S.B.C. 1996, c. 359, ss. 63 & 64.**

30. The test to be applied in considering whether to approve the sale by a receiver is settled law. The Court should consider:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

***Royal Bank v Soundair Corp.* 1991 CarswellOnt 205 (Ont. C.A.) ("*Soundair*") at para. 16.**

31. The *Soundair* principles have been applied by courts to approve sales in the context of instrument appointed receivers. For example, in *Re: Haultec Trailers,* the Court considered the sale of assets by a receiver appointed by a secured creditor. When considering a motion to "approve sale of assets by a receiver", the court stated that "the principles to be taken into account are [those] set forth in *Royal Bank v Soundair Corp.*"

***Re: Haultec Trailers Ltd.,* 2011 ONSC 2350 at para. 37.**

The APA Represents the Best Price for SNFW's Assets

32. When considering if a receiver has made sufficient efforts to obtain the best price and if a receiver has acted providently, a court should "examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer".

***Soundair,* at para. 21.**

33. The APA represents the best price offered for SNFW's assets. TBGI made sufficient efforts through the SISP to obtain the best price for the assets and undertakings of SNFW. The FWF Offer was the best offer received through the SISP.

TBGI Properly Considered the Interests of All Relevant Parties

34. When considering the interest of all parties, a court should primarily consider the interests of the creditors, but should also consider the interests of the debtor and other parties when appropriate in the circumstances.

***Soundair,* at para. 40.**

35. In this case, the Bank is SNFW's largest secured creditor. The Bank's security is far in excess of SNFW asset's realizable value and is the only creditor that can expect to realize on its security. Therefore, BMO submits in these circumstances that its interest should be the primary consideration of Honourable Court.

36. The Bank supports TBGI's acceptance of the FWF Offer and the APA. Further, the Bank submits that TBGI adequately considered its interest, and those of SNFW, when accepting the FWF Offer and the APA.

The Sales and Solicitation Process Used to Obtain the FWF Offer had Efficacy and Integrity

37. When considering the efficacy and integrity of the process to obtain the offer, a court should consider if the solicitation process was conducted with commercial efficacy and integrity.

***Soundair,* at para. 43.**

38. BMO submits that the sales and solicitation process was conduct with commercial efficacy, as:

(a) TBGI and MNP made sufficient efforts to market SNFW's assets and undertakings over the months of April and May;

(b) TBGI and MNP contacted a number of prospective purchasers and investors and provided adequate information to conduct due diligence on SNFW's affairs;

(c) TBGI and MNP carefully analyzed all bids received during the SISP and ultimately decided the FWF Offer was the best offer presented for the assets and undertakings of SNFW; and

(d) at all times the SISP has been open and transparent and has had the goal of realizing the maximum value for the assets and undertakings of SNFW.

The SISP was Fair

39. And finally, a court should consider if there was any unfairness in the sales process. As described above, the sales process conducted by TBGI was an open and commercially reasonable process. BMO submits that this Honourable Court should find the sales process fair in all the circumstances.

Conclusions

40. BMO submits that this Honourable Court should grant the orders sought sanctioning the sale and vesting the assets of SNFW to the Purchaser, as TBGI has acted honesty and in good faith and conducted the SISP in a commercially reasonable manner.

Part 4: MATERIAL TO BE RELIED ON

41. Affidavit #1 of Jesse Agassiz, made 21/07/2020.

42. The Trustee's Third Report, to be filed.

43. The Trustee's Second Report, dated 12/06/2020.

44. The Trustee's First Report, dated 21/04/2020.

The applicant(s) estimate(s) that the application will take 2.5 hours.

☐ This matter is within the jurisdiction of a master.

☒ This matter is not within the jurisdiction of a master, **as it involves inherent jurisdiction**. Madam Justice Fitzpatrick is seized of this matter.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days of service of this Notice of Application,

(a) file an Application Response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed Application Response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: July 21, 2020

Signature of lawyer for Bank of Montreal
Jordan Schultz

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this Notice of Application

☐ with the following variations and additional terms:

_____

_____

_____

Date:

Signature of ☐ Judge ☐ Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

☐ discovery: comply with demand for documents

☐ discovery: production of additional documents

☐ other matters concerning document discovery

☐ extend oral discovery

☐ other matter concerning oral discovery

☐ amend pleadings

☐ add/change parties

☐ summary judgment

☐ summary trial

☐ service

☐ mediation

☐ adjournments

☐ proceedings at trial

☐ case plan orders: amend

☐ case plan orders: other

☐ expert

SCHEDULE "A"

SERVICE LIST

Counsel for SNFW B.C. Ltd. Lawson Lundell LLP #1600 – 925 W. Georgia Street Vancouver, B.C. V6C 3L2 Attention: Kimberley Robertson Email: krobertson@lawsonlundell.com Tel: 604-631-9142
Counsel for Bank of Montreal Dentons Canada LLP 20th Floor, 250 Howe Street Vancouver, B.C.V6C 3R8 Attention: Jordan Schultz Email: jordan.schultz@dentons.com Tel: 604-691-6452
Counsel for Employee Group in Actions No. S203844 & S197593 Victory Square Law Office LLP 710 – 777 Hornby Street Vancouver, B.C. V6Z 1S4 Attention: Colin Gusikoski Email: cgusikoski@vslo.bc.ca Tel: 604-684-8421
Counsel for Club Members' Group (anticipated) McQuarrie Hunter LLP Suite 1500, 13450 - 102 Avenue, Surrey, BC V3T 5X3 Attention: Brad Kielmann & Rob Finlay Email: bkielmann@mcquarrie.com & rfinlay@mcquarrie.com Tel: 604-580-7073

Counsel for Steve Nash Gudmundseth Mickelson LLP 2525-1075 W Georgia St. Vancouver BC V6E 3C9 Attention: Howard A. Mickelson, Q.C. & Allan L. Doolittle Emails: ham@lawgm.com & ald@lawgm.com Tel: 604-685-6272
Counsel for Fiera Real Estate McCarthy Tétrault LLP Suite 4000 - 421 - 7th Avenue SW Calgary AB T2P 4K9 Attention: Pantelis Kyriakakis & Katie Doran Emails: pkyriakakis@mccarthy.ca & KDORAN@mccarthy.ca Tel: 1-403-260-3536
Selby Property Investments Limited Partnership Northland Properties #310 – 1755 W. Broadway Vancouver, B.C. V6J 4S5 Attention: Stephen Jackson & Michael Miello Emails: sjackson@northland.ca & MMiello@northland.ca Tel: 604-730-3746
Counsel for Crunch Franchising LLC Cassels Brock & Blackwell LLP #2200 – 885 West Georgia Street Vancouver, B.C. V6C 3E8 Attention: H. Lance Williams, Mary I.A. Buttery, Q.C., Sue Danielisz Emails: lwilliams@cassels.com, mbuttery@cassels.com, sdanielisz@cassels.com Tel: 604-691-6112

Counsel for Morgan Crossing Shopping Centre and its manager Strathallen Property Management Inc. Daoust Vukovich LLP 20 Queen Street West, Suite 3000, Toronto, ON, M5H 3R3 Attention: Michael Hochberg & Gasper Galati Emails: mhochberg@dv-law.com & ggalati@dv-law.com Tel: 1-416-597-9306
Office of the Superintendent of Bankruptcy Email: ic.osbservice-bsfservice.ic@canada.ca
Counsel for Project 120 Developments Ltd., the landlord of the leased premises at #200 – 19925 Willowbrook Dr., Langley BC. Miller Thomson LLP Pacific Centre, 400 – 725 Granville Street Vancouver, B.C. V7Y 1G5 Attention: Gordon Plottel Email: gplottel@millerthomson.com
Counsel for Matra Construction Inc., Ghani Law Corp. Barristers & Solicitors Suite 225 – 1080 Mainland Street, Vancouver, B.C. V6B 2T4 Attention: Usman Ghani Email: ug@uglaw.ca

SCHEDULE "B"

COURT NO. B200193
ESTATE NO.11-2636604
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF

SNFW FITNESS B.C. LTD.

ORDER MADE AFTER APPLICATION

	) THE HONOURABLE MADAM	)	
BEFORE	)	)	____/JUL/2020
	) JUSTICE FITZPATRICK	)	

ON THE APPLICATION of Bank of Montreal ("**BMO**") coming on for hearing at the Courthouse at 800 Smithe Street, Vancouver, British Columbia on the 21st day of July, 2020; AND ON HEARING Jordan Schultz, counsel for BMO, and those other counsel listed on Schedule "A" hereto; AND UPON READING the material filed, including the Third Report of the Proposal Trustee dated July __, 2020 (the "**Report**");

THIS COURT ORDERS AND DECLARES THAT:

1. The sale transaction (the "**Transaction**") contemplated by the Asset Purchase Agreement dated July __, 2020 (the "**Sale Agreement**") between the Receiver and FW Fitness BC Ltd. (the "**Purchaser**"), a copy of which is attached as Appendix "__" to the Report, is hereby approved, and the Sale Agreement is commercially reasonable. The execution of the Sale Agreement by the Receiver is hereby authorized and approved, and the Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance to the Purchaser of the assets described in the Sale Agreement (the "**Purchased Assets**").

2. Notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 is not required in respect of the Transaction.

3. Upon delivery by the Receiver to the Purchaser of a certificate certifying all conditions have been satisfied or waived and the Transaction has completed (the "**Receiver's Certificate**"), all of the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement shall vest absolutely in the Purchaser in fee simple, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing, all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* of British Columbia (all of which are collectively referred to as the "**Encumbrances**"), and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

4. For the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and from and after the delivery of the Receiver's Certificate all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having had possession or control immediately prior to the sale.

5. The Receiver is to file with the Court a copy of the Receiver's Certificate forthwith after delivery thereof.

6. Pursuant to Section 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act* or Section 18(10)(o) of the *Personal Information Protection Act* of British Columbia, the Receiver is hereby authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the company's records pertaining to the Debtor's past and current employees, including personal information of those employees listed in Schedule 1.1(17) to the Sale Agreement. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.

7. Subject to the terms of the Sale Agreement, vacant possession of the Purchased Assets, including any real property, shall be delivered by the Receiver to the Purchaser at 12:00 noon on the Closing Date (as defined in the Sale Agreement).

8. The Receiver, with the consent of the Purchaser, shall be at liberty to extend the Closing Date to such later date as those parties may agree without the necessity of a further Order of this Court.

9. Notwithstanding:

(a) these proceedings;

(b) any applications for a bankruptcy order in respect of the Debtor now or hereafter made pursuant to the Bankruptcy and Insolvency Act and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made by or in respect of the Debtor,

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute or be deemed to be a transfer at undervalue, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

10. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body, wherever located, to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

11. The Receiver or any other party have liberty to apply for such further or other directions or relief as may be necessary or desirable to give effect to this Order.

12. Endorsement of this Order by counsel appearing on this application, other than counsel for BMO, is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

_____

Signature of Jordan Schultz
Lawyer for Bank of Montreal

BY THE COURT.

_____

REGISTRAR

SCHEDULE "A"

(List of Counsel)

COUNSEL	NAME OF PARTY(IES) REPRESENTED

COURT NO. B200193
ESTATE NO.11-2636604
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
SNFW FITNESS B.C. LTD.

ORDER MADE AFTER APPLICATION

[*APPROVAL OF SALE*]

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